SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 769

THE SIOUX TRIBE OF INDIANS,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Sioux Tribe of Indians, by its attorney, Ralph H. Case, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case June 1, 1942, Court of Claims Docket Number C-531-(7), motion for new trial overruled October 5, 1942 (R. 97).

Opinion Below.

The opinion of the Court of Claims is not yet reported; but is set out in full in the transcript submitted with this petition (R. 23-95).

Jurisdiction.

An order extending the time within which to file a petition for a writ of certiorari to March 4, 1943, was signed by the Chief Justice on December 29, 1942 (R. 97).

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

Statement.

The petitioner comprises those Indians or their descendants of the Sioux Tribe who were parties to the Treaty of April 29, 1868 (15 Stat. 635). That Treaty established a permanent reservation for the Sioux Tribe in Dakota Territory, bounded as follows:

> "* * * commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; * * *"

(Art. 2, Treaty of April 29, 1868; 15 Stat. 635; R. 28-29.)

The same treaty also provided as follows:

> "In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the

right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase."

(Art. 11, Treaty of April 29, 1868; 15 Stat. 635; R. 32.)

The treaty further provided:

"The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained to pass through the same; * * * "

(Art. 16, Treaty of April 29, 1868; 15 Stat. 635; R. 34.)

The treaty also provided:

"No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty."

(Art. 12, Treaty of April 29, 1868; 15 Stat. 635; R. 33.)

By virtue of the foregoing provisions of the Treaty of 1868 the petitioner held title to the permanent reservation described in Article 2. It also held a large area of land to the south, west, and north of the permanent reservation under conditions expressed in the treaty.

In the year 1874 a military expedition in command of Lieutenant Colonel George A. Custer proceeded into the

area described in the foregoing quotations from the treaty for the purpose of exploration. As a result of the exploration made by the expedition under the command of Custer, gold was discovered in the Black Hills, which lie within the area reserved to petitioner. This discovery of gold was made public August 27, 1874, and thereupon the white citizens of the United States invaded the territory reserved to petitioner and took possession of the gold bearing area, or that which was supposed to be gold bearing, in violation of the treaty and in violation of the rights of petitioner (R. 35-36).

In the year 1875 a Commission headed by Hon. William B. Allison was appointed by the Secretary of the Interior, with instructions to negotiate with the Sioux Tribe of Indians, petitioner, for the acquisition by the Government of the Black Hills section of their reservation (R. 42). The instructions given the Commission appear, in part, in the findings of the court below (R. 42-43-44-45).

The Allison Commission held a council with the leaders and members of the Sioux Tribe in the month of June, 1875, which council resulted in a refusal by the Sioux Tribe, petitioner, to cede to the Government for the consideration offered by the Commission, the land within the Black Hills area (R. 45-46).

Concurrently with the foregoing council of 1875 a detailed geological examination of the Black Hills area was made under the direction of Walter P. Jenney, who submitted a report dated November 8, 1875, a portion of which report is set out in the findings of the court below (R. 46-49).

The Commissioner of Indian Affairs in his annual report for the fiscal year 1875 stated the conditions which prevailed in respect to the Black Hills area,—the gold rush, the invasion by the white citizens, the rights of the petitioner herein, and, in his opinion, the measure of compensation

which should be made to the Indians for the taking of their lands, which obviously seemed to have occurred or was about to occur (R. 49-52).

At the close of the year 1875 the white citizens of the United States were in possession of the Black Hills area; the Government had failed to close a treaty or agreement for the cession of the area. The President of the United States referring to the annual report of the Secretary of the Interior recommended to the Congress that appropriations for substance of the Sioux Indians "may be issued or withheld". The Secretary of the Interior in the report referred to by the President suggested as follows:

> "It is submitted, therefore, under these circumstances, for the consideration of Congress, whether it would not be justifiable and proper to make future appropriations for supplies to this people, contingent on the relinquishment of the gold fields in the Black Hills and the right-of-way thereof" (R. 52-54).

By the Act of August 15, 1876, the Congress provided that no further appropriations should be made for the subsistence of the Sioux Tribe, petitioner, until and unless the tribe relinquished all of that portion of their permanent reservation lying west of the 103rd meridian (R. 55-56).

The President appointed a Commission to negotiate further with the Sioux Tribe, petitioner, for the desired cessions and stipulations as provided by the Act of August 15, 1876. The Commission was unable to obtain the assent of three-fourths of the male adult Indians of the Sioux Tribe, petitioner, to the agreement proposed by the Commission. More than 90% of the Indians refused to assent (R. 56).

The Commission presented to the President, who in turn presented to the Congress, the document which had been entrusted to the Commission but which had not been as-

sented to by the Sioux Tribe, petitioner. The President in presenting the document to the Congress submitted the following statement:

> "I ask your especial consideration of these Articles of Agreement as among other advantages to be gained by them is the clear right of citizens to go into a country of which they have taken possession and from which they cannot be excluded" (R. 57).

Thereafter the Congress passed and the President signed the Act of February 28, 1877 (19 Stat. 254), which act of Congress established the western boundary of the permanent reservation of the Sioux Tribe, petitioner, as:

> "* * * the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated."

The effect of the foregoing Act of February 28, 1877, was to take from Petitioner 7,345,157 acres, which theretofore was a part of the permanent Reservation of Petitioner under the Treaty of 1868 (supra) (R. 16). Further the effect of the said Act was to take from the Petitioner their rights in lands outside the permanent reservation in 1868

to which lands Petitioner held the exclusive right to use and occupy, to roam over and hunt on.

The said Act of February 28, 1877, made provision for subsistence of the Sioux Tribe, petitioner. Under this Act the United States appropriated and expended a substantial sum of money in the years succeeding the passage of the Act.

The Petitioner asserts that it is entitled to just compensation for its lands and rights in lands taken from it by the Act of February 28, 1877. The action which is now before this Court was filed under an Act of Congress authorizing such action to be brought (Act of June 3, 1920, 41 Stats. 738).

Statutes Involved.

The material provisions of the Jurisdictional Act under which this cause of action is brought are as follows (Act of June 3, 1920, 41 Stat. 738):

> "That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

"Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys, employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said tribe or bands of Indians" (R. 2-4).

The material provisions of the Treaty of April 29, 1868, (15 Stat. 635) are as follows:

"Article 2. The United States agrees that the following district of country, to wit; viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same,

thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning, and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the censent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

"Article 10. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency-house on the reservation herein named, on or before the first day of August of each year, for thirty years, the following articles, to wit:

"For each male person over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of homemade socks.

"For each femade over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

"For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

"And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians on which the estimate from year to year can be based.

"And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named."

"Article 11. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase.

"Article 12. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

"Article 16. The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained to pass through the same;"

The material provisions of the Act of August 15, 1876 (19 Stat. 176, 192), are as follows:

"For this amount, for subsistence, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided,* That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude and shall also grant right-of-way over said reservation to the country thus ceded for wagon or other roads, from convenient and

accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for and provided for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision; And provided, also, That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting" (R. 55-56).

The material provisions of the Act of February 28, 1877 (19 Stat. 254), are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a certain agreement made by George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bullis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, with the different bands of the Sioux Nation of Indians, and also the Northern Arapaho and Cheyenne Indians, be, and the same is hereby, ratified and confirmed: *Provided,* That nothing in this act shall be construed to authorize the removal of the Sioux Indians to the Indian Territory and the President of the United States is hereby directed to prohibit the removal of any portion of the Sioux Indians to the Indian Territory until the same shall be authorized by an act of Congress hereafter enacted, except article four, except also the following portion of article six; 'And if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and com-

fortable dwelling house' said article not having been agreed to by the Sioux Nation; said agreement is in words and figures following, namely: 'Articles of Agreement made pursuant to the provisions of an Act of Congress entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes," approved August 15, 1876, by and between George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bullis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, and also the Northern Arapahoes and Cheyennes, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises.

"Article 1. The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29th, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including

all privileges of hunting; and article 16 of said treaty is hereby abrogated.

"Article 2. The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

"Article 3. The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity of the Missouri River, as the President of the United States shall designate.

"Article 5. In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef (or in lieu thereof, one-half pound of bacon), one half-pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided

by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted(unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor (the aged, sick, and infirm excepted); and as an incentive to industrious habits the Commissioner of Indian Affairs may provide that such persons be furnished in payment for their labor such other necessary articles as are requisite for civilized life. The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

"Article 8. The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."

Questions Presented.

Whether the Sioux Tribe, petitioner, by virtue of the Treaty of April 29, 1868 (*supra*) obtained title to and a vested interest in the lands described as the permanent reservation by said Treaty such that said title and interest could not be taken from the Sioux Tribe without the payment of just compensation under the Constitution of the United States.

Whether the Sioux Tribe, petitioner, by virtue of the Treaty of April 29, 1868 (supra), had an interest in the lands reserved for the use of the tribe and for hunting purposes outside the permanent reservation such that said interest could not be taken from the Sioux Tribe under the Constitution of the United States, without just compensation.

Whether the Act of February 28, 1877 (19 Stat. 254) was, by its terms, such a taking by the United States of the property of the Sioux Tribe, petitioner, as to require the payment of just compensation under the Constitution of the United States.

Whether the Jurisdictional Act of June 3, 1920 (41 Stats. 738) conferred jurisdiction on the Court of Claims and the Supreme Court of the United States to hear, consider and determine the action of the Sioux Tribe against the United States now before this Court.

Whether the Congress in passing the Act of June 3, 1920 (*supra*), intended by that Act that the Court of Claims and the Supreme Court of the United States shall have and exercise the jurisdiction and enter the determination stated in the foregoing question and further should be bound and obligated to exercise the jurisdiction and make the determination as provided by the Act of June 3, 1920.

Whether the determination of the amount of just compensation is a political question to be decided by the Legislative Branch of the Government or a judicial question to be decided by the courts.

Specifications of Error to Be Urged.

(1) The court below erred in the decision complained of in Finding 18 (R. 57) as appears in the following:

> "The record, as a whole, does not justify a finding that the chiefs, headmen, or the Indians of the Sioux

Tribe who assented to and signed the agreement, which became the Act of February 28, 1877, hereinafter mentioned, did so under duress, or that the commission used undue influence or imposed upon the Indians who did sign the agreement."

Petition relies upon the Act of August 15, 1876 (R. 55-56), to establish the fact that the Sioux Tribe was, by that Act, under duress.

(2) The court below erred in the following conclusions of law.

"A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a 'taking' or 'for the misappropriation of any lands of said tribe.' " (R. 72).

"In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the Price and Osage cases, and other cases cited, supra, was not conferred by the jurisdictional act. We must presume in the circumstances of this case that Congress acted in good faith" (R. 76).

"The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented."

"In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the Acts of Congress and inquire into any moral obligations

of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. Lone Wolf *v.* Hitchcock'' (R. 91).

''The plaintiff tribe is not entitled, as a matter of law, to recover from the United States, and the petition must therefore be dismissed. It is so ordered'' (R. 95).

(3) The court below erred in failing to give effect to the intent of Congress expressed in the Act of June 3, 1920 (*supra*).

(4) The court below erred in failing to follow the decisions of this Court that the question of ''just compensation'' is a judicial and not a political question.

Reasons for Granting the Writ.

(1) Petitioner asserted above and now asserts that lands belonging to the petitioner were taken from it without the payment of just compensation, thereby raising a constitutional question under the Fifth Amendment to the Constitution,—''nor shall private property be taken for public use without just compensation.''

(2) The amount in controversy is substantial. The Sioux Tribe, petitioner, includes not less than twenty-nine thousand individuals, all of whom are citizens of the United States; The area involved is not less than fifty million acres of land; The controversy is one of long standing, not less than sixty-five years.

(3) The court below in at least one other Indian case, to-wit: *Winnebago Tribe of Indians* v. *The United States,* Court of Claims, No. M-421, decided October 25, 1942, relies upon the decision in the case at bar as determining the *Winnebago* case.
Winnebago case.

In that case the court held—

> "We went into this entire question in great detail in an opinion rendered through Judge Littleton in the case of Sioux Tribe of Indians v. The United States, No. C-531-(7), decided June 1, 1942. In that opinion the whole question was carefully and exhaustively discussed. The decision in that case is determinative of the case at bar."

(4) The court below, in relying upon *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, has failed to follow the law as established by the decisions of this Court.

(5) The court below failed in its interpretation of the Jurisdictional Act of June 3, 1920 (supra) and further the court failed to give effect to the intent of the Congress expressed in the Act of June 3, 1920, and in the proceedings of the Congress when the bill which became the Act of June 3, 1920, was before the Congress for passage.

(6) The court below failed to follow the principle established by the decisions of this Court that the question of "just compensation" is a judicial and not a political question.

BRIEF.

On the Law.

Petitioner submits that the following principles of law are established by the decisions of this Court.

The power of the United States to control and manage the property of Indian tribes is incident to the sovereignty of the United States. That power has long been exercised. It is clearly stated in *United States* v. *Kagama*, 118 U. S. 375 at 385.

The power to administer Indian property is vested in the Congress and when exercised within constitutional limitations constitutes a political question not subject to the review by the courts; *Cherokee Nation* v. *Hitchcock*, 197 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

In the last two cited cases neither the *Cherokee Nation* nor *Lone Wolf* asserted a taking of Indian property by the Acts of Congress complained of. In each case an injunction was sought to restrain the Secretary of Interior from carrying out Acts of Congress administering Indian property. In neither case did the complaining parties proceed under a special jurisdictional act authorizing a judicial inquiry into the effect of the Acts of Congress complained of.

In neither the *Cherokee Nation case*, nor in the *Lone Wolf* case, did the complaining parties seek to recover damages for property taken.

The power of the Congress to administer Indian property must be exercised within constitutional limits. When in the exercise of that power the Congress transgresses constitutional limitations, the Indians affected by such transgressions are guaranteed judicial relief by the Constitution. *Lane* v. *Santa Rosa*, 249 U. S. 110; *Yankton Sioux Tribe* v. *U. S.*, 272 U. S. 351; *United States* v. *Creek Nation*, 295 U. S. 103; *Chippewa Indians* v. *United States*, 301 U. S. 358;

United States v. *Klamath and Moadoc Tribes*, 304 U. S. 119; *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 304 U. S. 111.

In the cases cited, with the exception of the first, the Indian Tribes proceeded under special jurisdictional acts seeking to recover damages for property taken by the United States. In each case it was established that the property had been taken and that such taking transgressed the constitutional limitation imposed upon the United States by the Constitution and it was held that the Indian Tribes were entitled to recover just compensation for their land.

In the case at bar the taking by the United States is fully established by the findings of fact entered by the Court of Claims. The Sioux Tribe, petitioner, proceeded in the Court of Claims under a clear and specific Jurisdictional Act authorizing the judicial inquiry and a determination of the claims of that Tribe.

In the case of the Shoshone Tribe v. United States, supra, the language of the Jurisdictional Act under which that Tribe proceeded follows closely the language of the Jurisdictional Act under which the Sioux Tribe, petitioner, is now proceeding.

In the case at bar petitioner's lands were taken from it by an Act of Congress (Act of February 28, 1877, supra). The taking was against the expressed will of the Tribe. The property when so taken was turned over to white citizens of the United States or held by the United States. The petitioner, at no time, has had any interest in the proceeds from the sale of the lands or the use of the lands so taken. The cases last cited are squarely in line with the case at bar and those cases support the contention of petitioner that in passing the Act of February 28th, 1877, supra, the Congress has transgressed the constitutional limitations imposed by it to the 5th Amendment to the Constitution.

The petitioner, under the Treaty of April 29, 1868, supra, held an Indian title to the lands described in that treaty. That title was as sacred as a title in fee held by any citizen of the United States. *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476; *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119; *United States* v. *Creek Nation*, 295 U. S. 103.

The question of "just compensation" is a judicial question and the courts cannot be foreclosed by a Congressional enactment that attempts to fix compensation for property taken by or under an Act of Congress. *Monongahela* v. *United States*, 148 U. S. 312; *United States* v. *Lynah*, 188 U. S. 445; *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645; *United States* v. *Russell*, 13 Wall. 623.

In the Monongahela case the Congress attempted to eliminate the value of the Company's franchise from consideration by the courts. Thus the Congress attempted to fix just compensation for the property taken from the Monongahela Company.

Correspondingly in the case at bar, the Act of Congress which took the Sioux lands, provided for subsistence of the Sioux Tribe, but limited the appropriations therefor to such time as the Sioux Indians might be able to support themselves. The compensation thus provided for the Sioux Tribe by the Act of February 28, 1877, is indefinite and uncertain, subject to the will of the Congress, subject to a change of opinion by the Congress, subject to the uncertain factor of self-support. Cf. *Re Heff*, 197 U. S. 488.

The rule which fixes just compensation is "what the property was worth at the time it was taken, together with such added amount for the use of the property from the time it was taken to the time of judgment as will be just compensation to the owner. *United States* v. *New River Collieries Co.*, 262 U. S. 341.

It is only necessary to read the Act of February 28th, 1877, to see that the Act by its terms does not provide just compensation within the rule last above stated.

The Court of Claims erred in deciding that the power to take the lands of an Indian tribe for public purposes and the resulting power to fix just compensation is a single unit of power and wholly of a political nature. In the case of *United States* v. *Jones,* 109 U. S. 513, this Court clearly drew the dividing line between the power to take lands for public use and the resultant power to fix just compensation for said lands.

In the case referred to, the Government's theory was that both the power to take and the power to fix just compensation were included in a single political question. In discussing the theory of the Government's position, the Court said:

> 518-519 "There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignity and, as said in *Boom Co.* v. *Patterson,* requires no constitutional recognition. 98 U. S. 406 (XXV., 208). The provision found in the 5th Amendment to the Federal Constitution, and in the Constitutions of the several states, for just compensation for the property taken, is merely a limitation upon the use of the power. *It is no part of the power itself, but a condition upon which the power may be exercised."* (Italics ours.)

On the Facts.

The question of what the Congress intended when it had before it the bill H. R. 400, which became the Act of February 20, 1877, of major importance in the case at bar.

The Court below, R. 92-93-94, quoted from the Report of the Committee on Indian Affairs of the House of Repre-

sentatives (66th Congress, 1st Session). The Court failed to take into consideration the fact that the claim which is now being presented to this Court was the only claim which was called to the attention of the Congress at the time the bill, H. R. 400, was under consideration. That bill was introduced by Harry L. Gandy, Member of Congress, Third District of South Dakota. The bill was reported by Mr. Gandy to the House. Mr. Gandy was a Member of the Conference Committee on the part of the House and when the conference report was before the House for final action, speaking for the conferees on the part of the House, Mr. Gandy said in part:

> "By far the largest claim of the Sioux is that with relation to the alleged enforced cession of the Black Hills in 1876, and for that reason this bill has been very commonly referred to among the Sioux as the Black Hills Claim bill." (Congressional Record, House of Representatives, May 28th, 1920, page 7846).

Mr. Gandy also stated on the same occasion:

> "Now, after all these years there will be a determining of this question, and if it shall be found that the lands of the Sioux Indians were wrongfully appropriated an accounting shall be had and just payment shall be made therefor. This should be done from the standpoint of right and justice." (Congressional Record, House of Representatives, May 28, 1920, p. 7848).

The authority for the last quotation from the Congressional Record is found in a recent decision of this Court in *Carter M. Harrison, etc.* v. *The Northern Trust Co. et al.*, — U. S. —, Jan. 11, 1943, where the Court said:

> "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.' "

The Court below held that the Sioux Indians were not under duress in 1876 when the Articles of Agreement were presented to the Tribe (R. 55, 56).

At that time the members of the Sioux Tribe were told by the Commission of the Act of August 15, 1876 (19 Stats. 176) (R. 55-56). The legal effect of the Act of August 15th, 1876, was to place the Sioux Tribe under duress. The Act of August 15, 1876, threatened the suspension of all appropriations for subsistence of the Sioux Tribe unless they agreed to the cession of the Black Hills area. The Sioux Tribe, at that time, enjoyed the guarantees contained in Article 10 of the Treaty of April 10, 1868, supra, which provisions were to run for thirty years. The provision in Article 10 for the annual appropriation of $10 per capita for Sioux Indians who were roaming and hunting was in itself sufficient, if properly expended, to have provided the Sioux Tribe with as much subsistence as they were then receiving. Therefore, the threat to stop the appropriations for subsistence of the Sioux Tribe put the Sioux Tribe in imminent peril, and this does constitute duress.

Conclusion.

In view of the foregoing, it appears clear that the Court below has failed to distinguish between the power to administer Indian property on the one hand and the results of the exercise of that power on the other hand.

In the case at bar the results of the exercise of the power to control Indian property plainly transgress constitutional limitations.

The property of the Sioux Tribe was taken from it by the Act of February 28th, 1877, supra. By the terms of that Act the Congress attempted to fix the compensation which would be paid to the Sioux Tribe for its lands. The lands in question were not administered for the benefit of the

Sioux Tribe, but were thrown open to white settlement. The Sioux Tribe had no further interest in the lands, nor in the proceeds derived from those lands.

The case is clearly one for a judicial determination of just compensation. Petitioner respectfully submits that the writ should issue.

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(5045)

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 769

THE SIOUX TRIBE OF INDIANS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 63–95) is not yet reported.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered June 1, 1942 (R. 97). A motion for a new trial was denied October 5, 1942 (R. 97). The petition for a writ of certiorari was filed February 26, 1943, within the time as extended (R. 97). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended (28 U. S. C. sec. 288).

QUESTIONS PRESENTED

1. Whether the Agreement of 1876 in which, for certain considerations, the Sioux Indians relinquished all claims to lands outside the reservation therein described constituted a taking of lands and rights granted by Treaty of 1868, when the Agreement was not approved by two-thirds of the adult male Indians as required by Article XII of the treaty.

2. Whether in any event the Indians relinquished all claims to such lands by the Agreement of 1889 which was approved in the manner prescribed by Article XII of the 1868 treaty.

TREATY, AGREEMENTS, AND STATUTES INVOLVED

The material portions of the treaty, agreements, and statutes involved are set out in the findings as follows: The Fort Laramie Treaty of 1868, 15 Stat. 635, in finding 4 (R. 28–34); the Indian Appropriation Act of August 15, 1876, c. 289, 19 Stat. 176, in finding 17 (R. 55–56); the Agreement of 1876, as approved by Act of February 28, 1877, c. 72, 19 Stat. 254, in finding 19 (R. 57–61); the Agreement of 1889, as embodied in the Act of March 2, 1889, c. 405, 25 Stat. 888, in finding 21 (R. 62–63). The material parts of the special jurisdictional Act of June 3, 1920, c. 222, 41 Stat. 738, are printed in the opinion below (R. 69–70).

STATEMENT

Under authority of the Act of June 3, 1920, c. 222, 41 Stat. 738, the Sioux Tribe on May 7, 1923, filed a petition which, as amended on May 7, 1934, asserted a right to recover approximately $739,116,256 representing the value, with interest, of 73,781,826.19 acres of land alleged to have been taken by the United States (R. 1–20; see R. 23). The Government asked for dismissal of the petition (R. 21).

The undisputed facts, as found by the Court of Claims (R. 23–63), may be summarized as follows:

In 1868 the United States and the Sioux Tribe entered into the Fort Laramie Treaty. By Article II of this Treaty a certain territory known as the Great Sioux Reservation was "set apart for the absolute and undisturbed use and occupation" of the tribe. The western boundary of this reservation was located at the one hundred and fourth meridian of longitude.[1] For their part, the Indians relinquished "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided." (R. 28–29.) Article XII provided that "No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as

[1] A map showing the reservation of 1868 and also the boundary established by the Agreement of 1876 may be found in the Government's brief in *Sioux Tribe* v. *United States* 316 U. S. 317, No. 798, October Term, 1941.

against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or intrested in the same; * * *" (R. 33). In Article XI the Indians reserved the right to hunt on certain lands outside the reservation "so long as the Buffalo may range thereon in such numbers as to justify the chase" (R. 32), and such hunting lands were designated "unceded Indian Territory" from which the United States agreed to exclude white settlers (art. XVI, R. 34).

The United States also agreed to provide schools, a carpenter, a blacksmith, and similar services (R. 29–30), to furnish each Indian with enumerated articles of clothing for thirty years (R. 31) and to furnish each Indian who settled on the reservation "for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at any earlier date" (art. X, R. 32). The appropriations for subsistence of meat and flour pursuant to this provision in the next four years totaled $5,295,761.91 (R. 54).

In 1874 an expedition discovered gold in the Black Hills region in the western part of the reservation (R. 35). When news of this discovery became public knowledge, white men invaded the Great Sioux Reservation in such numbers that it became very difficult to keep them out although every effort was made to conform to the treaty (R. 40–42). Negotiations were commenced in 1874

to obtain a relinquishment of the Black Hills portion of the Great Sioux Reservation and also of the hunting rights. The Secretary of the Interior stated that buffalo in sufficient numbers to justify the chase could no longer be found in the area. (R. 36.) In 1875 an agreement for relinquishment of the hunting rights in Nebraska was accordingly signed and, although Congress did not specifically ratify the agreement, the $25,000 consideration for such release was appropriated by Congress and was spent for the benefit of the Indians (R. 39–40).

Although the treaty obligation to furnish meat and flour subsistence expired in 1873, the Government continued to furnish such subsistence, $2,350,000 being appropriated for this purpose between 1874 and 1876 (R. 55; see also R. 50, 54). However, in 1876 Congress conditioned any further subsistence appropriations on the relinquishment by the Indians of their hunting rights and the Black Hills portion of their permanent reservation (R. 55–56). Act of August 15, 1876, c. 289, 19 Stat. 176. A formal agreement was accordingly negotiated in September and October 1876, providing for a relinquishment of hunting rights and a cession of 7,345,157 acres of land in the Black Hills (R. 34, 56). In return, the United States agreed to convey to the Indians an additional 900,000 acres of grazing land to the north of the reservation and to furnish specified rations to the members of the tribe "until the Indians are able to support themselves" (R. 62). Although

the chiefs and headmen of the various tribes signed this agreement, it was assented to by less than ten percent of the adult male Indians (R. 56). Congress ratified the agreement by the Act of February 28, 1877, c. 72, 19 Stat. 254 (R. 57). Since that time, Congress has appropriated approximately $43,000,000 in performance of its promise to furnish rations (R. 62).

In 1889 the Great Sioux Reservation was divided into separate reservations for the various bands of Sioux Indians (see R. 62). Section 19 of the Act of March 2, 1889, c. 405, 25 Stat. 888, 896, provided that all of the provisions of the 1876 agreement, not in conflict with the 1889 Act, "are hereby continued in force according to their tenor and limitation" (R. 62). As required by Section 28 of the 1889 Act, consent was given thereto by three-fourths of the adult male Indians in the manner provided by Article XII of the 1868 treaty (R. 63).

Upon these facts the Court of Claims concluded that petitioner was not entitled to recover (R. 63) and accordingly dismissed the petition (R. 97).

ARGUMENT

The amended petition alleged that the United States had misappropriated three distinct classes (classes "A," "B," and "C") of lands totaling 73,781,826.19 acres (R. 10–11; see R. 23). Class "B" lands constituting 25,858,594.95 acres were outside the lands granted by the Treaty of 1868 (R. 11, 16–17, 34). Petitioner claimed such

lands under the Treaty of 1851. However, all rights to lands outside of those specifically mentioned in the 1868 Treaty were relinquished in that treaty (Articles II, XVII, R. 29, 34). See *Sioux Tribe* v. *United States,* 316 U. S. 317. Clearly, these class "B" lands have not been misappropriated. The claim has been abandoned, for no mention thereof is now made by petitioner.

1. The amended petition also claimed compensation for the alleged taking of the right to hunt over class "C" lands embracing 40,578,123.25 acres (R. 11, 17–18). Petitioner advances the theory (Pet. 21) that because the Agreement of 1876 was not approved by three-fourths of the adult male Indians, the Act of 1877 ratifying the agreement constituted a taking of the lands described therein. However, this agreement can have no application to the class "C" lands because Article XII of the Treaty of 1868 requiring the three-fourths consent to a cession of land applied only to the Great Sioux Reservation (R. 33). It did not limit the authority of the tribal chiefs to release hunting rights on lands outside the reservation. Hence, the Agreements of 1875 (R. 39) and 1876 (R. 57–61) signed by the chiefs and the headmen of the tribes releasing such rights were valid.[2]

[2] Moreover, the hunting rights were not perpetual but only lasted "so long as the buffalo may range thereon in such numbers as to justify the chase" (R. 32). In 1875 the Secretary of the Interior stated to the Indians that buffalo no longer appeared in sufficient quantity to make it worth while to hunt them (R. 36).

Petitioner's principal claim is for the alleged taking of 7,345,157 acres of Class "A" lands constituting the Black Hills portion of the Great Sioux Reservation.

Despite a contrary finding of the Court of Claims (R. 57), petitioner asserts (Pet. 25) that the 1876 agreement was signed under duress, contending that the United States was already bound to furnish subsistence. Such contention is without substance because an examination of Article X of the 1868 treaty, of which petitioner quotes only a part (Pet. 10), makes it plain that the obligation to furnish meat and flour subsistence was limited to four years and had therefore expired in 1873 (R. 32). Petitioner likewise fails to refer to the finding that the subsistence appropriations for 1874–1876 were in addition to those required by the treaty and were therefore gratuitous.[3]

Petitioner's contention (Pet. 21) that the failure to obtain the necessary three-fourths consent converted the Agreement of 1876, as approved

[3] The expenditures which have been made to fulfill the requirements of the 1868 Treaty are listed in *Sioux Tribe* v. *United States*, 85 C. Cls. 181, 192, certiorari denied, 302 U. S. 717. That case rejected a claim for alleged nonpayment of part of the $10 annuity provided for by Article X of the treaty. Similar claims for alleged failure to furnish goods or services under the treaty were rejected in *Sioux Tribe* v. *United States*, 84 C. Cls. 16, certiorari denied, 302 U. S. 740; *Sioux Tribe* v. *United States*, 86 C. Cls. 299, certiorari denied, 306 U. S. 642; and *Sioux Tribe* v. *United States*, 89 C. Cls. 31.

by the Act of 1877, into a taking is equally erroneous. The rule that property of an Indian tribe cannot constitutionally be confiscated by the United States without giving rise to a legal claim for just compensation (*United States* v. *Creek Nation,* 295 U. S. 103; *Shoshone Tribe* v. *United States,* 299 U. S. 476; and *Chippewa Indians* v. *United States,* 301 U. S. 358) only applies when the United States departs from its role as guardian and treats the Indian's property as its own. It does not limit the general rule that when action is taken by Congress as guardian for the benefit of the Indian wards, the manner in which Congress chooses to exercise its guardianship power may not be reviewed by the courts. *Klamath Indians* v. *United States,* 296 U. S. 244, 254–255; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 567–568; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 306–308; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *Chippewa Indians* v. *United States,* 88 C. Cls. 1, 32, affirmed, 307 U. S. 1. Cf. *Seminole Nation* v. *United States,* 92 C. Cls. 210, certiorari denied, 313 U. S. 563; *Creek Nation* v. *United States,* 92 C. Cls. 269, certiorari denied, 313 U. S. 581. Specifically, the question of whether an agreement ceding Indian land is valid notwithstanding that three-fourths of the adult male Indians have not consented to the cession as required by the previous treaty is "solely within the domain of the legislative authority and its action

is conclusive upon the courts." *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 568. The Act of 1877 was not, as petitioner asserts (Pet. 22–23), a taking under the power of eminent domain with an attempt by Congress to fix the amount of just compensation. Rather, as this Court pointed out in the *Lone Wolf* case, it was an exercise of Congress' power to change the form of investment of property administered by the Federal Government.

The consideration for the cession of the 7,345,157 acres included in the Black Hills portion of the Great Sioux Reservation and for release of the hunting rights (for which $25,000 had already been paid; see Statement, *supra,* p. 5) took the form of a grant of 900,000 acres of grazing land and the promise to furnish subsistence, which was essential to the Indians. This promise has resulted in the payment of $43,000,000 (R. 62). Congress determined that this constituted a fair consideration for the lands surrendered. This determination of Congress may not be reviewed by the courts even if it is believed that the consideration was inadequate. *Klamath Indians* v. *United States,* 296 U. S. 244.[4] Petitioner's reference (Pet. 23–24) to the special jurisdictional Act

[4] Under the circumstances of the instant case, the agreement clearly represented a fair exchange. Although gold was known to exist, the quantity and value thereof was, of course, indefinite. The Indians could not themselves extract

of June 3, 1920, c. 222, 41 Stat. 738, under which this suit was brought, does not indicate a different result, for its material provisions (R. 69–70) are identical, except for the Indians named, to those of the Act of May 26, 1920, c. 203, 41 Stat. 623, under which the *Klamath* case arose.

2. In any event, a subsequent agreement negotiated with the Sioux Tribe is a complete defense to petitioner's claim of an alleged wrongful taking based on the failure of three-fourths of the adult Sioux Indians to ratify the Agreement of 1876. In 1889 the Great Sioux Reservation was divided among the various bands of the Sioux Indians (see R. 62). Section 19 of the Act of March 2, 1889, c. 405, 25 Stat. 888, 896, provided that all of the provisions of the 1876 agreement not in conflict with the 1889 Act "are hereby continued in force according to their tenor and limitation" (R. 62). As required by Section 28 of the 1889 Act, consent was given thereto by three-fourths of the adult male Indians (R. 63). This constituted a re-execution of the 1876 agreement. It is, therefore, immaterial that the cession of hunting rights and lands in the Black Hills Region was not signed by the requisite number of

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the gold, for skillful workmen and capital were required (R. 47). On the other hand, "A failure to receive Government rations for a single season would reduce them [the Indians] to starvation" (R. 50). Thus, in 1876 the subsistence was of much greater value to the Indians than this relatively small portion of the lands they owned.

Indians in 1876. Having ratified the 1876 agreement in 1889 and having accepted the benefits thereunder for more than sixty-five years, petitioner cannot now complain of the manner in which that agreement was originally executed.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions or questions of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1942.

No. 769.

THE SIOUX TRIBE OF INDIANS, *Petitioner*,

v.

THE UNITED STATES.

On Petition for Writ of Certiorari to the Court of Claims.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

The petitioner, by counsel, makes the following reply to respondent's brief in opposition.

UNDER THE CAPTION "QUESTIONS PRESENTED."

Respondent has misstated the questions presented. Question No. 1 (Respondent's Brief in Opposition, p. 2) distorts the real question which is set out on page 16 of the petition herein (Question number three). Further the Respondent has misstated Article 12 of the Treaty of April 29, 1868 (15 Stats. 635) in stating that the proposed agree-

ment of 1876 "was not approved by *two-thirds* of the adult male Indians as required by Article 12 of the Treaty (of 1868)."

Article 12 of the Treaty of 1868 requires that *three-fourths* of the adult male Indians of the Sioux Tribe must sign any treaty for the cession of any part of the permanent reservation created by that Treaty.

In respondent's Question No. 2 (Respondent's Brief in Opposition, p. 2) it is stated that "the Indians relinquished all claims to said lands by the agreement of 1889." In that question is respondent's only hope for denial of the writ of certiorari in this case. Therefore this reply.

NO RELINQUISHMENT OF THIS CLAIM EXISTS.

Respondent failed to quote Section 19 of the Act of March 2, 1889 (25 Stat. 888). That section is as follows:

> "Sec. 19. That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred sixty eight, and the agreement with the same approved February twenty-eighth, eighteen hundred seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding."

When this section is read in its full text it, conclusively, appears to be in the form and manner of the customary legislative saving clause. Such saving clauses appear in hundreds of amendatory statutes. Section 19, *supra,* does not change the status, the rights nor the obligations of the United States or the Sioux Tribe (or Nation) of Indians. It merely states that the *status quo ante* is maintained except as specifically altered by the terms of the said Act of March 2, 1889. At no other point, in no other words, in the Act of March 2, 1889, is reference made which may in any way be construed as a relinquishment or a release of the pending claim of petitioner. In the words quoted from the

said act by respondent there is not even a remote indication that either the Sioux Indians in the year 1889 or the United States considered Section 19 of that Act as a relinquishment or as a release of the pending action. If a release or relinquishment was intended by the United States, such intention was not disclosed to the Sioux Indians at the time the agreement of March 2, 1889, was presented to the Sioux Indians for their acceptance.

The Court will take judicial notice of the message of President Harrison dated February 10, 1890, which message accompanied the Presidential proclamation, provided for by the Act of March 2, 1889, declaring the said Act to be in full force and effect. That message is set out in Senate Executive Document 51, 51st Congress, 1st session. On pages 1 and 2 of that Executive Document are found the following words:

> "At the outset of the negotiations the Commission was confronted by certain questions as to the interpretation and effect of the act of Congress which they were presenting for the acceptance of the Indians. Upon two or three points of some importance the Commission gave, in response to these inquiries, an interpretation to the law, and it was the law thus explained to them that was accepted by the Indians. The commissioners had no power to bind Congress or the Executive by their construction of a statute, but they were the agents of the United States, first to submit a definite proposition for the acceptance of the Indians, and, that failing, to agree upon modified terms, to be submitted to Congress for ratification. They were dealing with an ignorant and suspicious people, and an explanation of the terms, and effect of the offer submitted could not be avoided. Good faith demands that if the United States accepts the lands ceded, the beneficial construction of the act given by our agents should be also admitted and observed.
>
> "The chief difficulty in the construction of the act grows out of its relation to prior treaties, which were by section 19 continued in force so far as they are not in conflict with the terms of the act. The seventh article of the treaty of 1868, relating to schools and

school-houses, is by section 17 of the act continued in force for twenty years, 'subject to such modifications as Congress shall deem most effective to secure to said Indians equivalent benefits of such education.'

"Section 7 of the treaty of 1868 provides only for instruction in the 'elementary branches of an English education,' while section 17 of the act, after continuing this section of the treaty in force, provides a fund which is to be applied 'for the promotion of industrial and other suitable education among said Indians.' Again, section 7 of the treaty provides for the erection of a schoolhouse for every thirty children who can be induced to attend, while section 20 of the act requires the erection of not less than thirty school-houses, and more if found necessary.

"The Commissioners were asked by the Indians whether the cost of the English schools provided for in section 7 of the treaty, and of the school-houses provided for in the same section, and in section 20 of the act, would be a charge against the proceeds of the lands they were now asked to cede to the United States. This question was answered in the negative, and I think the answer was correct. If the act, without reference to section 7 of the treaty, is to be construed to express the whole duty of the Government towards the Indians in the matter of schools, the extension for twenty years of the provisions of that section is without meaning.

"The assurance given by the commissioners that the money appropriated by section 27 of the act to pay certain bands for the ponies taken by the military authorities in 1876 would not be a charge against the proceeds of the ceded lands was obviously a correct interpretation of the law.

"The Indians were further assured by the commissioners that the amount appropriated for the expenses of the Commission could not under the law be made a charge upon the proceeds of their lands. This I think is a correct exposition of the act.

"It seems from the report of the Commission that some of the Indians at the Standing Rock Agency asked whether, if they accepted the act, they could have the election to take their allotments under section 6 of the treaty of 1868 and have the benefits of sections 8 and 10 of that treaty and were told that they could.

> "As the treaty is continued in force, except where it contravenes, the provisions of the act, I do not see any difficulty in admitting this interpretation."

In submitting to the Congress the "Report and the Proceedings of the Sioux Commission" all of which is set out in the Executive Document above referred to, the President of the United States did not by word or implication suggest that the language in Section 19 of the Act of March 2, 1889, was a relinquishment, a release or an abandonment of the claim of petitioner herein for just compensation for the valuable lands taken from the Sioux Tribe by the Act of February 28, 1877 (19 Stats. 254). It is, therefore, conclusive that neither the United States nor the Sioux Tribe of Indians considered that section (19) of the Act as doing any thing other than leaving the parties exactly where they theretofore were as to rights and obligations, except as specifically altered by the said Act.

The respondent, however, now asserts, as a reason for denying the writ of certiorari, that the eleven words quoted from section 19 of the Act of March 2, 1889, should be, by the Court, regarded as a relinquishment of a valid claim for compensation for the lands which were taken from the 1868 permanent reservation by the Act of February 28, 1877. Nothing has been submitted by respondent in support of that bald assertion.

If this assertion by respondent, lacking the substance, has even the odor of merit, it is in effect the old common law plea of confession and avoidance. Such plea admits that there was a taking of petitioner's lands as claimed in this case and that a relinquishment was intended by both the United States and the Sioux Tribe when they joined in the Agreement which is set out in the Act of March 2, 1889. Such plea may be relied upon for what it is worth by respondent in trial on the merits. It can not be set up as a reason for denial of the writ but is, indirectly, a further reason for the granting of the writ.

The words quoted by respondent and as well the entire section 19 of the Act of March 2, 1889, now quoted by peti-

tioner, do not show that a relinquishment of anything was intended by either the United States or the Sioux Tribe. However, as the respondent evidently relies on those eleven quoted words, it is pertinent here to state how words in treaties and agreements between the United States and Indian tribes should be construed.

CONSTRUCTION OF INDIAN TREATIES AND AGREEMENTS.

In *Jones* v. *Meehan,* 175 U. S. 1, at p. 11, this Court said:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations of the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms on which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."*

By Act of Congress (April 15, 1874) a large area of what is now the state of Montana was set aside for certain

*For the same proposition see: (1) *Northern P. R. Co.* v. *United States,* 227 U. S. 355; (2) *United States* v. *Winans,* 198 U. S. 371; (3) *Blue Jacket* v. *Johnson County,* 5 Wall. 737; (4) *Choctaw Nation* v. *United States,* 119 U. S. 1; (5) *United States* v. *Shoshone Tribe,* 304 U. S. 111.

In a later case, *Winters* v. *United States,* 207 U. S. 564, it appears the following factual situation was under consideration by the Court.

named Indian tribes. Subsequently, the United States for the purpose of opening this land up for settlement, entered into an agreement with the Indians whereby the latter "ceded, sold, transferred, and conveyed" to the United States all the lands embraced in said area except Fort Belknap Reservation. This agreement was subsequently ratified by Act of Congress.

The lands in question are arid lands. Through them, however, runs Milk River, a non-navigable stream. Before the agreement above referred to the Indians had used the waters of Milk River for irrigation purposes. After their removal to Fort Belknap this use was continued and extended, the facts showing that such a use is indispensable for the continued productivity of the land.

Defendants are parties who have settled above Fort Belknap after the agreement above mentioned was entered into. They are now diverting a large portion of the water from Milk River for their own purposes.

Plaintiff, the United States, brings this bill to enjoin the defendants from diverting the water. Defendants' contention is that under the agreement entered into between the United States and the Indians aforementioned, the Indians sold the land on which defendants now reside to the Government and the Indians did not expressly reserve to themselves any water rights. Defendants concede that the Indians had a claim to these rights before the agreement was made, but since they failed to mention it in said agreement, the rights must be considered as waived. The Court held that the argument depended upon the interpretation that was to be given to the agreement and that viewing all the circumstances, defendants' interpretation was unsound. In stating the general rule for construing Indian agreements, the Court said (pp. 576-577):

> "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose

of the agreement and the other impair or defeat it. On account of their relation to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might mitigate against or defeat the declared purpose of themselves and the Government, even of (sic) it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

CONCLUSION.

From the foregoing it appears:

That the words of Section 19 of the Act of March 2, 1889, do not purport to be a relinquishment of petitioner's pending claim.

That the said section was not construed as a relinquishment of this claim by the President of the United States in 1890.

That no such construction of said section was in the mind of the Sioux Indians, petitioner here, at the time the agreement of March 2, 1889, was ratified by them.

That if there is ambiguity in, or if said section 19 may be otherwise construed, then the words of that section must be construed in the light of the cases cited and quoted from herein.

It is, therefor, submitted that respondent has failed to offer sound objections to the petition herein; that petitioner has shown cause for the granting of the writ and that the writ of certiorari to the Court of Claims should be granted.

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